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Legal Bulletin

A summary of developments in the law

At a glance

SGX proposes new measures to strengthen corporate governance practice 4

Workplace Safety and Health (Safety and Health Management System and Auditing) Regulations 2009 in force from 1 March 2010 5

International Arbitration (Amendment) Act comes into force 1 January 2010: Better court support for arbitration proceedings 7

Goods and Services Tax Act to be amended with effect from 1 January 2010 to implement Budget 2009 changes 8

IDA releases the Advisory Guidelines on Contract Period and Early Termination Charges for Telecommunication Services offered to End Users 9

MOF launches Budget 2010 Feedback Exercise 11

2009 year in review: Key legal and regulatory developments 11

Singapore High Court construes conclusive evidence clause in account opening documents 21

Singapore High Court interprets restraint of trade clauses in directors' service agreements with company 22

Singapore District Court finds listed company director failed to use reasonable diligence 26

Singapore Court of Appeal on enforceability of foreign judgment relating to claim for gambling debt 27

Singapore Court of Appeal finds binding contract between parties for grant of option and that doctrine of part performance part of Singapore law 33

Click here for Table of Contents

In this issue

Articles

SGX proposes new measures to strengthen corporate governance practice 4

Workplace Safety and Health (Safety and Health Management System and Auditing) Regulations 2009 in force from 1 March 2010 5

International Arbitration (Amendment) Act comes into force 1 January 2010: Better court support for arbitration proceedings 7

Goods and Services Tax Act to be amended with effect from 1 January 2010 to implement Budget 2009 changes 8

IDA releases the Advisory Guidelines on Contract Period and Early Termination Charges for Telecommunication Services offered to End Users 9

MOF launches Budget 2010 Feedback Exercise 11

2009 year in review: Key legal and regulatory developments 11

Cases

Banking

Singapore High Court construes conclusive evidence clause in account opening documents 21

Corporate & financial services

Singapore High Court interprets restraint of trade clauses in directors' service agreements with company 22

Singapore District Court finds listed company director failed to use reasonable diligence 26

Dispute resolution

Singapore Court of Appeal on enforceability of foreign judgment relating to claim for gambling debt 27

Intellectual property & technology

Singapore Court of Appeal considers the requirement of "use as a trade mark" for the purpose of trade mark infringement 29

Real estate

Singapore Court of Appeal finds binding contract between parties for grant of option and that doctrine of part performance part of Singapore law 33

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News

Suntec Real Estate Investment Trust's private placement of 128.5 million new units	35
Proposed acquisition of Heineken's entities in Indonesia and New Caledonia by Asia Pacific Breweries Limited	35
MacarthurCook Industrial REIT's proposed recapitalisation exercise	36
MacarthurCook Industrial REIT's term loan facility	37
Starhill Global REIT acquires Starhill Gallery and Lot 10 in Malaysia	37
Mermaid Maritime Public Company Limited's rights issue	37
Acquisition of David Jones Building	38
Benchmark notes issue by OCBC	38
Initial public offering of existing shares in CapitaMalls Asia Limited by CapitaLand Limited	38

Allen & Gledhill LLP also publishes the monthly Financial Services Bulletin. To view the December 2009 issue, please click here.

Articles

SGX proposes new measures to strengthen corporate governance practice

On 9 December 2009, the Singapore Exchange Limited (the "**SGX**") released a public consultation paper inviting comments on proposed new measures to strengthen the corporate governance practices of listed companies and safeguard shareholders' interests. The public consultation remains open for feedback until 15 January 2010.

Some of the proposed measures are highlighted below:

- Disclosure by a shareholder of a listed company when he pledges his shares, if:

  (i) the total shares pledged are 30 per cent. or more of the company's issued share capital;

  (ii) an enforcement of the share pledge may result in a breach of loan covenants by the company; or

  (iii) he is the single largest controlling shareholder and at least half of his shares are pledged.

- Restriction on all share transfers during a trading suspension.
- A newly listed company must consider engaging a governance adviser for two years post listing to ensure that the company has a good corporate governance framework and practices.

Other proposed changes relate to the following:

- Changes concerning directors and key executive officers
- Composition of board of directors
- Changes concerning CFOs
- Changes concerning auditors
- Internal controls system and risk management framework

Reference materials

Please **click here** to access the consultation paper.

Please **click here** for the SGX press release in relation to the above development.

Both resources are posted on the SGX website **www.sgx.com**

Back to Contents Page

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Workplace Safety and Health (Safety and Health Management System and Auditing) Regulations 2009 in force from 1 March 2010

The Workplace Safety and Health (Safety and Health Management System and Auditing) Regulations 2009 (the "**Regulations**") will come into operation on 1 March 2010. The Regulations are intended to enhance the implementation of the safety and health management system at workplaces and strengthen the workplace safety and health auditing regime.

Background

The Regulations are issued following a public consultation conducted by the Ministry of Manpower (the "**MOM**") on a draft version of the Regulations. From 29 July 2009 to 19 August 2009, the MOM sought feedback from members of the public on the draft Regulations.

Scope of Regulations

When in force, the Regulations will consolidate the various existing regulatory requirements on safety and health management system into a single set of regulations. Aside from providing for safety and health management systems, obligations to appoint workplace safety and health auditors, and internal review of safety and health management system, the Regulations also deal with the approval of workplace safety and health auditors, their duties and power.

Requirement to implement safety and health management system

Occupiers of the following workplaces need to implement a safety and health management system for the purpose of ensuring the safety and health of persons at work in the workplace:

- Worksites, that is, any premises where any building operation or works of engineering construction is carried out by way of trade or for purposes of gain;

- Shipyards, that is, any yard (including any dock, wharf, jetty, quay and the precincts thereof) where the construction, reconstruction, repair, refitting, finishing or breaking up of ships is carried out;

- A factory engaged in the manufacturing of fabricated metal products, machinery or equipment and in which 100 or more persons are employed;

- A factory engaged in the processing or manufacturing of petroleum, petroleum products, petrochemicals or petrochemical products;

- Premises where the bulk storage of toxic or flammable liquid is carried on by way of trade or for the purpose of gain and which has a storage capacity of 5,000 or more cubic metres for such toxic or flammable liquid;

- A factory engaged in the manufacturing of fluorine, chlorine, hydrogen fluoride or carbon monoxide, and synthetic polymers;

- A factory engaged in the manufacturing of pharmaceutical products or their intermediates; and

- A factory engaged in the manufacturing of semiconductor wafers.

The safety and health management system must be implemented in accordance with the relevant Singapore Standard relating to safety and health management systems or such other standards, codes of practice or guidance issued or approved by the Workplace Safety and Health Council.

Obligation to appoint workplace safety and health auditors

Occupiers of the following workplaces need to appoint a workplace safety and health auditor to audit the safety and health management system of the workplace:

- A worksite with a contract sum of S$30 million or more;
- A shipyard in which 200 or more persons are employed;
- A factory engaged in the manufacturing of fabricated metal products, machinery or equipment and in which 100 or more persons are employed;
- A factory engaged in the processing or manufacturing of petroleum, petroleum products, petrochemicals or petrochemical products;
- Premises where the bulk storage of toxic or flammable liquid is carried on by way of trade or for the purpose of gain and which has a storage capacity of 5,000 or more cubic metres for such toxic or flammable liquid;
- A factory engaged in the manufacturing of fluorine, chlorine, hydrogen fluoride or carbon monoxide, or synthetic polymers;
- A factory engaged in the manufacturing of pharmaceutical products or their intermediates; and
- A factory engaged in the manufacturing of semiconductor wafers.

The audit must be carried at specified frequencies ranging from once every six months to once every 24 months.

Internal review of safety and health management system

A worksite with a contract sum of less than S$30 million is required to conduct an internal review of its safety and health management system at least once every six months. A shipyard in which less than 200 persons are employed has to conduct the review at least once every 12 months.

Reference material

An article about the public consultation was featured in a previous issue of the Allen & Gledhill Legal Bulletin (August 2009). To read the article entitled "*MOM conducts public consultation on proposed Workplace Safety and Health (Safety & Health Management System & Auditing) Regulations*", please **click here**.

Back to Contents Page

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This recent development was highlighted in the Allen & Gledhill Arbitration Alert of 23 December 2009. If you would like to be on our arbitration related electronic communications mailing list, please e-mail us at publications@allenandgledhill.com

International Arbitration (Amendment) Act comes into force 1 January 2010: Better court support for arbitration proceedings

On 1 January 2010, the International Arbitration (Amendment) Act 2009 (the "**Amendment Act**") will come into force. The Amendment Act amends the International Arbitration Act (the "**IAA**") and the Arbitration Act (the "**AA**"). These amendments are outlined below.

Definition of arbitration agreement

The Amendment Act widens the definition of "arbitration agreement" in both the IAA and the AA to include agreements made by electronic communications, such as electronic messages.

Interim measures

A new provision, section 12A, will be introduced into the IAA to provide the Singapore High Court with the power to order interim measures in international arbitrations, regardless of whether or not the place of arbitration is Singapore. The interim measures which the High Court may order are as follows:

(i) Giving of evidence by affidavit;

(ii) The preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute;

(iii) Samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject-matter of the dispute;

(iv) The preservation and interim custody of any evidence for the purposes of the proceedings;

(v) Securing the amount in dispute;

(vi) Ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and

(vii) An interim injunction or any other interim measure.

There are, however, limits to the High Court's power to order the above interim measures. As a starting point, the High Court's power may only be exercised to the extent that the arbitral tribunal, and an arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively. In addition, unless the case is urgent, the High Court may only make an order for interim measures with the permission of the arbitral tribunal, or written agreement of the parties. Should the arbitral tribunal subsequently make an order expressly relating to a whole or part of an earlier order of the High Court, the order of the High Court will cease to have effect in whole or in part, as the case may be.

Further, the High Court may refuse to exercise its powers to order interim measures if the fact that the place of arbitration is outside Singapore, or likely to be outside Singapore, makes it inappropriate to make such an order.

The Amendment Act also introduces a new provision in the AA which mirrors the new section 12A of the IAA.

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Authentication of arbitration awards

The Amendment Act amends both the IAA and the AA to empower the Minister for Law to appoint any person holding office in an arbitral institution or other organisation to authenticate arbitration awards which are made in Singapore and arbitration agreements, and certify copies thereof, for the purposes of enforcement of awards in countries which are Contracting States to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

Back to Contents Page

Goods and Services Tax Act to be amended with effect from 1 January 2010 to implement Budget 2009 changes

The Goods and Services Tax Act will be amended with effect from 1 January 2010 to implement changes proposed in the Budget Statement 2009 as well as to effect amendments arising from an ongoing review of the GST system. The changes to the Goods and Services Tax Act, which are made pursuant to the Good and Services Tax (Amendment) Act 2009, include the following:

- Zero-rating of all aircraft, including private aircraft, used wholly for international transportation as well as the sale and lease of qualifying aircraft parts;
- Providing for the temporary removal of goods, without payment of GST, from a warehouse outside the free trade zone for the purpose of an auction, exhibition or other similar event involving the display of goods;
- Allowing a trust to be registered in its own name, while continuing to make the trustees liable for compliance with the Act;
- Extending to electronic vouchers the current practice of accounting for GST on physical vouchers at the point where the physical vouchers are redeemed for goods and services. A new Part XIIIA has been introduced in the Goods and Services Tax (General) Regulations to implement this change; and
- Requiring taxpayers to state precisely their grounds of objection when applying for a review or revision of a decision made by the Comptroller of GST.

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To support the implementation of the above changes, the following regulations and orders have been issued, all of which will also come into effect from 1 January 2010:

- Goods and Services Tax Act - Goods and Services Tax (General) (Amendment No. 3) Regulations 2009
- Goods and Services Tax Act - Goods and Services Tax (Imports Relief) (Amendment No. 2) Order 2009

- Goods and Services Tax Act - Goods and Services Tax (International Services) (Amendment No. 2) Order 2009

Reference materials

For more information about this development, please refer to the article entitled "*Parliament passes Goods and Services Tax (Amendment) Bill 2009: Implementing Budget 2009 changes*" that was featured in a previous issue of the Allen & Gledhill Legal Bulletin (August 2009). To read the article, please **click here**.

Back to Contents Page

IDA releases the Advisory Guidelines on Contract Period and Early Termination Charges for Telecommunication Services offered to End Users

On 15 December 2009, the Info-communications Development Authority of Singapore (the "**IDA**") released the "Advisory Guidelines on Contract Period and Early Termination Charges for Telecommunication Services offered to End Users" (the "**Guidelines**").

Summary of the Guidelines

The Guidelines explain how the IDA will apply sub-section 3.2.3 of the Telecom Competition Code 2005 (the "**Code**") to early termination charges ("**ETCs**") that are tied to contract periods in relation to end user service agreements. Sub-section 3.2.3 of the Code requires operators to ensure that the ETCs are reasonably proportionate to the discounts given and the amount of time the end user has completed on the contract.

In summary, the Guidelines stipulate that operators offering residential mobile, fixed-line telephony, and broadband services must:

- limit the duration of contract periods for such services to no more than 24 months;

- ensure that any ETCs for early termination of a service contract do not include costs that will be avoided by the operators when they cease the provision of the service to the end user; and

- ensure that ETCs are graduated on a month-by-month basis if the contract periods are longer than three months. This means that ETCs must decrease monthly, in tandem with the number of months that are left on an end user's contract.

Commencement date

The Guidelines will take effect on 1 March 2010 and apply only to contracts concluded after this date. However, the IDA expects that, in the interim, any new service offerings introduced by operators should comply fully with the Guidelines.

Scope of the Guidelines

The Guidelines will apply to:

- any single and multiple product packages which include any residential mobile, fixed-line telephony and/or broadband services (including those multiple-product packages that may also include other types of residential services); and

- all value-added services offered pursuant to any residential mobile, fixed-line telephony and/or broadband services.

The Guidelines are not applicable to mobile, fixed-line telephony and broadband services offered to business/corporate customers.

Non-compliance with the Guidelines

The Guidelines clarify the standards that the IDA will generally apply in assessing whether a service agreement contravenes the Code. The IDA will consider taking regulatory actions against any operator offering residential mobile, fixed-line telephony and broadband services which do not meet the requirements set out in the Guidelines.

Reference materials

Please click on the following links to view the documents released by the IDA on the above development:

- **Guidelines**
- **IDA press release**
- **Cover note on the Guidelines published by the IDA**

These materials are available at the IDA's website **www.ida.gov.sg**

Background information

The Guidelines follow a public consultation conducted by the IDA in December 2008/January 2009. For details of the issues raised in the consultation paper, please **click here** to read an article entitled "*IDA conducts public consultation on Guidelines on Maximum Contract Term and Early Termination Charges for Telecommunication Services Offered to Consumers*" that was featured in a previous issue of the Allen & Gledhill Legal Bulletin (January 2009).

Back to Contents Page

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MOF launches Budget 2010 Feedback Exercise

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On 30 November 2009, the Ministry of Finance (the "**MOF**") launched the Budget 2010 Feedback Exercise. Through this move, the MOF hopes to engage the general public on issues relating to public spending and gather views on the initiatives Budget 2010 can include to enable sustained and inclusive growth for Singapore. The feedback exercise is open until 12 February 2010.

Please **click here** to submit feedback online on the Budget 2010 website **http://app.singaporebudget.gov.sg/budget_2010/default.aspx**

Please **click here** for the MOF press release on this development, which is posted on the MOF website **www.mof.gov.sg**

Back to Contents Page

2009 year in review: Key legal and regulatory developments

In this last issue for the year 2009, the Allen & Gledhill Legal Bulletin provides an overview of the key developments in 2009. These developments are listed according to the following categories and links are provided to the issue of the Allen & Gledhill Legal Bulletin or Allen & Gledhill Financial Services Bulletin in which the development was reported:

- Banking
- Bankruptcy
- Casino control
- Competition
- Corporate
- Dispute Resolution
- Employment
- Insurance
- Intellectual Property and Technology
- Islamic Finance
- Limited Partnerships
- Media and Telecommunications
- Medico-Legal
- Moneylenders
- Real Estate
- Regulatory

- Securities and Futures
- Singapore Exchange
- Tax
- General

If you would like to share with us your thoughts about this review, please e-mail us at **publications@allenandgledhill.com**

Key legal and regulatory developments in 2009

Banking	
MAS implements from 1 March 2009 revised rules for unsecured credit to individuals from financial institutions	**March 2009**
Banking (Amendment No. 3) Regulations 2009: Minimum capital requirements for wholesale banks	**August 2009**
MAS issues consultation paper on proposed requirements for bank's private equity and venture capital investments	**December 2009**
Bankruptcy	
Bankruptcy (Amendment) Bill 2009 passed in Parliament: Implementation of Debt Repayment Scheme	**January 2009**
Bankruptcy (Amendment) Act 2009 in force on 18 May 2009: Implementation of Debt Repayment Scheme	**May 2009**
Casino Control	
Parliament introduces Casino Control (Amendment) Bill 2009: Changes affecting casino tax and persons excluded from casinos	**August 2009**
Parliament passes Casino Control (Amendment) Bill 2009: Changes affecting casino tax and persons excluded from casinos	**September 2009**
Casino Control (Amendment) Bill 2009 commences operation: Changes affecting casino tax and persons excluded from casinos	**October 2009**
Competition	
CCS issues response to submissions on changes to leniency programme	**January 2009**
Corporate	
Steering Committee for reviewing Companies Act studying three areas for change	**February 2009**
Steering Committee for Reviewing Companies Act to conduct public consultation on draft Companies (Amendment) Bill in 2010	**July 2009**
SGX initiatives in pipeline to strengthen corporate governance	**September 2009**

MAS to establish Corporate Governance Council and review of Code of Corporate Governance in the pipeline	**November 2009**
Dispute Resolution	
MinLaw proposes changes to enhance the legislative infrastructure for Singapore's international arbitration regime	**August 2009**
Ministry of Law clarifies provision in International Arbitration (Amendment) Bill 2009 concerning curial support of arbitration proceedings	**September 2009**
Parliament passes International Arbitration (Amendment) Bill 2009: Provisions on curial support of arbitration proceedings	**October 2009**
International Arbitration (Amendment) Act comes into force 1 January 2010: Better court support for arbitration proceedings	**December 2009**
Employment	
MOM issues updated guidelines on managing excess manpower to further help companies lower costs and save jobs	**May 2009**
MOM issues advisories for Influenza A (H1N1-2009)	**June 2009**
MOM issues Third Tripartite Advisory and Workplace Checklist to mitigate spread of Influenza A (H1N1-2009)	**July 2009**
MOH issues Advisory on Influenza A (H1N1-2009) for Workplaces (Sustained Community Transmission)	**August 2009**
MOM conducts public consultation on proposed Workplace Safety and Health (Safety & Health Management System & Auditing) Regulations	**August 2009**
MOM revises obligations of employers of foreign workers: Higher insurance cover for medical costs, change in security bond conditions from 1 January 2010	**October 2009**
MOF announces extension of Jobs Credit Scheme for six months	**October 2009**
MOM releases Tripartite Advisory on Managing Manpower Challenges for companies no longer facing excess manpower	**November 2009**
MOM conducts public consultation on draft Tripartite Guidelines for Re-employment of Older Employees	**November 2009**
Workplace Safety and Health (Safety and Health Management System and Auditing) Regulations 2009 in force from 1 March 2010	**December 2009**
Insurance	
Insurance (Amendment) Bill 2009 passed in Parliament: New statutory framework for nomination of beneficiaries under life policies	**January 2009**

MAS conducts consultation on proposed policy positions on the definition of a "Singapore policy" for policies purchased by individuals	**January 2009**
Insurance (Amendment) Act 2009 partially in force from 1 March 2009: Enabling inclusion of life insurance policies in trust structures	**March 2009**
MAS public consultation on proposed definitions of "carrying on insurance business" and "soliciting insurance business" in Insurance Act	**May 2009**
MAS responds to feedback on public consultation on proposed definitions of "carrying on insurance business" and "soliciting insurance business" for Insurance Act	**July 2009**
New statutory framework for nomination of beneficiaries under Insurance Act in force from 1 September 2009	**September 2009**
MAS responds to feedback from consultation paper on proposed revisions to insurance risk based capital requirements on outstanding premiums from brokers, agents and other counter-parties	**November 2009**
MAS issues response to feedback about proposed policy position on definition of a "Singapore policy" under First Schedule of the Insurance Act	**December 2009**
Intellectual Property and Technology	
Maximising the ownership and exploitation of intellectual property assets during an economic recession	**February 2009**
IPOS and USPTO launch Patent Prosecution Highway, a pilot cooperation initiative	**February 2009**
ASEAN States launch ASEAN Patent Examination Co-operation (ASPEC) Programme with effect from 15 June 2009	**June 2009**
Patent Prosecution Highway Pilot Programme between Intellectual Property Office of Singapore and Japan Patent Office	**June 2009**
IPOS invites feedback on proposed changes to Singapore's patent system	**July 2009**
MinLaw announces establishment of Singapore Office of WIPO Arbitration and Mediation Center in January 2010	**August 2009**
Parliament introduces Copyright (Amendment) Bill 2009: Changes to the jurisdiction and operational aspects of the Copyright Tribunal	**August 2009**
IPOS invites feedback on proposed changes to Singapore's patent system: Closing date for feedback extended to 4 September 2009	**August 2009**
Copyright (Amendment) Bill 2009 passed in Parliament: Changes to the jurisdiction and operational aspects of the Copyright Tribunal	**September 2009**
IPOS not considering graduated response systems or "three strikes" law for online infringement	**September 2009**

SGNIC launches Chinese domain names in Singapore	**November 2009**
Islamic Finance	
MAS announces completion of Singapore dollar sovereign-rated sukuk and *Murabaha* inter-bank placement and *Ijara Wa Igtina* transactions allowed	**January 2009**
Banking (Amendment) Act Regulations 2009: Permitting diminishing *musharaka* financing and spot *murabaha* transactions by banks from 7 May 2009	**May 2009**
Tax regulations provide further details of Prescribed Islamic Financing Arrangements	**October 2009**
Limited Partnerships	
Limited Partnerships Act 2008 commences operation on 4 May 2009	**May 2009**
IRAS issues guide on income tax treatment of limited partnerships	**July 2009**
Media and Telecommunications	
IDA conducts public consultation on "Guidelines on Maximum Contract Term and Early Termination Charges for Telecommunication Services Offered to Consumers"	**January 2009**
IDA public consultation on Review of the Code of Practice for Info-communications Facilities in Buildings (COPIF) for the Use of Space and Facilities by Licensees	**February 2009**
IDA releases the Advisory Guidelines on Contract Period and Early Termination Charges for Telecommunication Services offered to End Users	**December 2009**
Medico-Legal	
Human Organ Transplant (Amendment) Bill 2009 tabled for first reading in Parliament	**January 2009**
MOH and SMC propose amendments to the Medical Registration Act	**January 2009**
Parliament passes Human Organ Transplant (Amendment) Bill 2009: Allowing payment for living donors	**March 2009**
MOH issues response to feedback received on proposed amendments to Medical Registration Act	**June 2009**
Human Organ Transplant (Amendment) Act 2009: Allowing payment for living donors and other changes with effect from 1 November 2009	**July 2009**
National Registry of Diseases Act in force on 1 August 2009: Establishment of National Registry of Diseases	**August 2009**
Parliament introduces Medical Registration Act (Amendment) Bill 2009: Changes in disciplinary matters	**October 2009**

Moneylenders	
Moneylenders Act 2008 in force from 1 March 2009: Moneylending activities within a modern regulatory framework	**March 2009**
Parliament introduces changes to Moneylenders Act 2008 to enhance enforcement measures against unlicensed moneylenders	**November 2009**
Real Estate	
Government implements measures to ensure stable and sustainable property market	**September 2009**
MND launches consultation paper on new regulatory framework for real estate industry	**October 2009**
Regulatory	
MAS issues Guidelines on Fair Dealing - Board and Senior Management Responsibilities for Delivering Fair Dealing Outcomes to Customers	**April 2009**
MAS issues consultation paper on proposed revisions to the MAS Notices on the Prevention of Money Laundering & Countering the Financing of Terrorism	**May 2009**
MAS proposes amendments to MAS Notice 639 (Exposure to Single Counterparty Groups)	**June 2009**
MAS requires financial institutions to perform enhanced customer due diligence on domestic PEPs from 2 December 2009	**July 2009**
MAS issues circular on technology risk management	**September 2009**
MAS discloses its involvement in international discussion fora on proposals to strengthen risk management regulatory framework for financial institutions	**October 2009**
Parliament to amend Government Securities Act to enable early redemption of Government securities and regulation of primary dealers	**November 2009**
MAS issues revised Notices: Financial institutions to perform enhanced customer due diligence on domestic politically exposed persons from 2 December 2009	**December 2009**
Securities and Futures	
Securities and Futures (Amendment) Bill 2009 and Financial Advisers (Amendment) Bill 2009 passed in Parliament on 19 January 2009	**January 2009**
MAS issues circular to clarify treatment of refinancing under the aggregate leverage limit	**January 2009**
Extended settlement contracts and structured warrants: Exemption in Securities and Futures regulations from requirement to hold representative's licence	**February 2009**

MAS consults on proposals to strengthen the regulation of the sale and marketing of unlisted investment products	**March 2009**
Partial commencement of Securities and Futures (Amendment) Act 2009 on 20 April 2009	**April 2009**
MAS issues circular on goods and services tax remission on prescribed expenses for prescribed funds managed by prescribed fund managers in Singapore	**April 2009**
Singapore implements ASEAN and Plus Standards Scheme to facilitate cross-border offerings of securities within ASEAN region	**June 2009**
MAS consults on amendments to Securities and Futures (Offers of Investments) (Collective Investment Schemes) Regulations 2005: Changes in regulatory regime for restricted schemes	**June 2009**
MAS conducts policy consultation on proposed changes to licensing and conduct of business rules	**June 2009**
MAS conducts public consultation on proposal to mandate AGMs for S-REITs	**June 2009**
MAS consults on draft Regulations supplementing changes to licensing and business conduct requirements under SFA and FAA	**July 2009**
Securities and Futures (Amendment) Act (Commencement) (No. 2) Notification 2009: Changes to Securities and Futures Act affecting securities offerings and market misconduct enforcement implemented	**August 2009**
MAS issues response to feedback received on proposed changes in regulatory regime for restricted schemes	**August 2009**
New regulatory regime for restricted schemes to be implemented via CISNet with effect from 1 October 2009	**September 2009**
MAS to proceed to mandate AGMs for REITs from 1 January 2010	**September 2009**
MAS responds to feedback on proposals to enhance regulatory framework for unlisted investment products	**September 2009**
MAS launches CISNet and CISNet Guides	**October 2009**
MAS revises Property Funds Guidelines in Code on Collective Investment Schemes to provide for AGM requirement for REITS	**November 2009**
Singapore Exchange	
SGX introduces measures to facilitate equity fund raising through rights issue	**January 2009**
SGX reschedules launch of Extended Settlement contracts from 23 January 2009 to 20 February 2009	**January 2009**
SGX member firms implement robust business continuity arrangements by 2010	**January 2009**

SGX issues consultation paper on revised requirements for direct business trades	**January 2009**
SGX issues consultation paper on proposed launch of SGX options on MSCI Singapore Index Futures Contract	**January 2009**
SGX introduces further measures to facilitate fund raising	**February 2009**
SGX issues consultation paper on proposed rules to allow listings of life science companies on Catalist	**February 2009**
SGX issues response to feedback received on consultation on the proposed launch of the SGX options on the MSCI Singapore Index Futures Contract	**February 2009**
SGX proposes revisions to derivatives clearing fund structure	**February 2009**
SGX-ST Listing Rules revised with effect from 24 March 2009 to facilitate fund raising and strengthen corporate governance of listed issuers	**March 2009**
SGX issues consultation paper on proposed revised settlement processes to manage non-delivery of securities	**March 2009**
SGX implements three initiatives to develop its options market	**April 2009**
SGX issues response to feedback received from public consultation on proposed revision of SGX-DC Clearing Fund structure	**May 2009**
SGX issues consultation paper on proposed revisions to CDP clearing fund structure and introduction of large exposure collateralisation for securities	**June 2009**
SGX issues consultation paper on proposed amendments to SGX-DC Clearing Rules to facilitate clearing arrangement between SICOM and SGX	**June 2009**
SGX conducts public consultation on proposed rules for listing of early stage mineral, oil and gas companies on Catalist	**August 2009**
SGX and Chi-X Global Inc contract to develop and launch exchanged-backed dark pool in Asia-Pacific region	**August 2009**
SGX requires companies seeking delisting to provide reasonable exit offer to shareholders	**September 2009**
SGX and SICOM launch clearing arrangement on 1 October 2009	**September 2009**
SGX releases consultation paper on proposals to reduce minimum bid sizes and widen Forced Order Range	**September 2009**
SGX improves securities settlement processes to reduce incidence of failed trades	**October 2009**
SGX responds to feedback from consultation on risk-based approach for CDP Clearing Fund structure and new large exposure collateralisation framework	**October 2009**
SGX announces revised dates to implement new settlement processes and penalty framework	**November 2009**

SGX proposes new measures to strengthen corporate governance practice	**December 2009**
Compulsory declaration and marking of short-selling orders and publication of short-selling statistics to start in first half of 2010	**December 2009**
Tax	
Budget 2009: Analysis of Major Tax Changes	**January 2009**
IRAS seeks feedback on proposed tax framework for corporate amalgamations	**February 2009**
IRAS circular provides guidance on voluntary disclosure and waiver or reduction of penalties	**March 2009**
IRAS issues supplementary circular on transfer pricing guidelines for related party loans and related party services	**March 2009**
MOF announces endorsement by Singapore of OECD Standard for exchange of information through DTAs	**March 2009**
MOF conducts public consultation on draft Income Tax (Amendment) Bill 2009: Implementing Budget 2009 changes	**June 2009**
MOF conducts public consultation on draft Goods and Services Tax (Amendment) Bill 2009: Implementing Budget 2009 changes	**June 2009**
MOF proposes changes to Income Tax Act to implement internationally agreed standard for exchange of information	**July 2009**
Parliament introduces Goods and Services Tax (Amendment) Bill 2009: Implementing Budget 2009 changes	**July 2009**
Parliament passes Goods and Services Tax (Amendment) Bill 2009: Implementing Budget 2009 changes	**August 2009**
MOF issues response to feedback received on draft Income Tax (Amendment) Bill 2009	**August 2009**
Income Tax (Amendment) (Exchange of Information) Bill 2009: Changes to implement international standard for exchange of information	**September 2009**
Parliament introduces Income Tax (Amendment) Bill 2009: Implementing Budget 2009 changes and other changes	**September 2009**
Parliament passes Income Tax (Amendment) (Exchange of Information) Bill 2009: Changes to implement international standard for exchange of information	**October 2009**
Singapore joins OECD white list after signing 12th agreement incorporating international standard for exchange of information for tax purposes	**November 2009**
Parliament passes Income Tax (Amendment) Bill 2009: Implementing Budget 2009 changes and other changes	**November 2009**
Goods and Services Tax Act to be amended with effect from 1 January 2010 to implement Budget 2009 changes	**December 2009**

MOF launches Budget 2010 Feedback Exercise	**December 2009**
General	
Civil Law (Amendment) Bill 2009 passed in Parliament: Lowering the age of contractual capacity from 21 years to 18 years	**January 2009**
International Interests in Aircraft Equipment Bill 2009 passed in Parliament: Establishing a legal framework for international interests in aircraft objects	**January 2009**
Business Registration (Amendment) Bill 2009 passed in Parliament: Registration of professionals under Business Registration Act and facilitation of enforcement of injunctions granted under Trade Marks Act	**January 2009**
Lowering of age of contractual capacity from 21 years to 18 years effective 1 March 2009	**February 2009**
International Interests in Aircraft Equipment Bill 2008: Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment expected to be in force in Singapore on 1 May 2009	**February 2009**
Consumer Protection (Fair Trading) (Amendment) Act 2008 in force from 15 April 2009: Consumer protection extended to financial products and services and other changes	**March 2009**
Singapore establishes legal framework for international interests in aircraft objects	**April 2009**
Business Registration (Amendment) Act 2009 in force on 1 May 2009: Registration of professionals under Business Registration Act and facilitation of enforcement of injunctions granted under Trade Marks Act	**May 2009**
IDA and AGC seek views on proposed changes to electronic transactions legislation	**July 2009**
Parliament passes Quorums of Statutory Boards (Miscellaneous Amendments) Bill 2009: Revising quorum for board meetings of statutory boards	**October 2009**
New UK Supreme Court replaces UK House of Lords from 1 October 2009	**November 2009**

Back to Contents Page

Cases

Banking

Singapore High Court construes conclusive evidence clause in account opening documents

RBS Coutts Bank Ltd v Shishir Tarachand Kothari [2009] SGHC 273

In *RBS Coutts Bank Ltd v Shishir Tarachand Kothari*, the Singapore High Court held that the precise effect of a conclusive evidence clause will depend upon its specific wording and formulation.

Background facts

In 2006 the defendant opened an account with RBS Coutts Bank Ltd ("**RBS Coutts**") so that he could engage in investment and forex trading activities. At the time he was provided with a set of account opening forms and RBS Coutts' General Terms and Conditions (the "**General Terms**"). The defendant's account was governed by these General Terms and a number of other agreements (the "**Agreements**"). The General Terms included a conclusive evidence clause which was worded as follows:

> "A certificate signed by any authorised representative of RBS Coutts showing the amount of Obligations from time to time due from you to RBS Coutts shall be conclusive evidence as against you of the amount so owing".

The defendant engaged in several forex transactions during 2007. However, towards the end of the year, the US dollar weakened and market forces drastically turned against the defendant's positions in these transactions. From the beginning of 2008 RBS Coutts told the defendant to either inject more funds into his account in order to maintain his positions or to close out the positions so as to minimise losses. The defendant failed to do either.

In accordance with its rights under the General Terms, RBS Coutts closed out the defendant's positions in the forex transactions in March 2008. At the end of the closing out process the defendant owed RBS Coutts US$569,109. Pursuant to the conclusive evidence clause in the General Terms, RBS Coutts issued a conclusive certificate of indebtedness to this effect. The defendant did not make the payment and RBS Coutts initiated court proceedings to recover the amount owed.

Conclusive evidence clauses

The High Court stated that it was clear "that a certificate or statement issued pursuant to a conclusive evidence clause is, in the absence of fraud or manifest error on the face of the certificate, determinative of the amount due".

However, the High Court did not believe that the conclusive evidence clause in the General Terms precluded the court from undertaking a legal review of the appropriateness of the payment demand itself. The High Court agreed with the view expressed in *Standard Chartered Bank v Neocorp International Ltd* [2005] 2 SLR 345 that "the real foundation for the legal efficacy of such a clause is contract … . It is not possible for a contract to create rights and at the same time to deny to the other party in whom they vest the right to invoke the jurisdiction of the courts to enforce them."

The High Court noted that there is a significant degree of variation in the way in which conclusive evidence clauses are drafted in practice. As a result, their effect will depend upon their specific wording and formulation.

Decision

The defendant argued that he was not bound by either the General Terms or the Agreements because he was not provided with copies of them, that he did not authorise some of the forex transactions and that his account was wrongfully manipulated to reflect a deficit. He was unsuccessful at first instance and appealed.

The High Court noted that the defendant was an experienced businessman who had been involved in numerous investments through various private bankers and that he did not raise any concerns about the General Terms and Agreements before the close-out date. The High Court found that the defendant clearly knew he was agreeing to the terms in the Agreements and General Terms and, as such, was bound by them. His appeal was therefore dismissed.

Back to Contents Page

Corporate & financial services

Singapore High Court interprets restraint of trade clauses in directors' service agreements with company

Hengxin Technology Ltd v Jiang Wei and Another Suit
[2009] SGHC 259

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In *Hengxin Technology Ltd v Jiang Wei and Another Suit*, the Singapore High Court considered whether the defendants, former directors in a company, were in breach of the restraint of trade clauses included in their service agreements with that company.

Facts

Jiang and Qian (the "**defendants**") were directors in Hengxin Technology Ltd (the "**company**") and had entered into service agreements with the company in February 2006 (the "**service agreements**"). The company also had a subsidiary in China called Jiangsu Hengxin Technology Co Ltd (the "**Jiangsu company**"). Qian was a shareholder of the company, its executive chairman and chief executive officer as well as the general manager and legal representative of the Jiangsu company. Jiang was an executive director of the company as well as head of sales at the Jiangsu company of which division he was the deputy general manager.

In December 2006, another director (one Cui Genxiang ("**Cui**")) and a shareholder called an extraordinary general meeting ("**EGM**") to remove Qian, Jiang, and two independent directors from the company's Board. Arising from this, Qian, Jiang, the two independent directors, and the company secretary tendered their resignation from the company on 17 and 18 January 2007. The court found that the removal of Qian and Jiang arose from the personal motives of Cui.

Subsequently, Qian was informed via fax to comply with handover procedures on 23 January 2007. Pending the handover, Qian was instructed to continue managing the production at the Jiangsu company but not to make any management decisions.

The Jiangsu company was closed from 21 January 2007 to 4 February 2007 by apparent order of Qian and the new management alleged that they could not gain access. Qian's employment was subsequently terminated by a notice put up at the Jiangsu company and by a letter which stated that he would be paid salary in lieu of the six months' notice he was entitled to under the service agreement.

The company alleged that Jiang was absent without leave when the new management arrived at the Jiangsu company and that he was uncontactable. Jiang was informed via memorandum that he was relieved of his position as the head of sales. Jiang instead resigned and the company conveyed its acceptance of his resignation in a letter. The company also said it would pay him six months' salary in lieu of notice.

The company also alleged that the defendants had set up a direct competitor to the company's business through incorporating a company called Trigiant Group ("**Trigiant**") in February 2007.

Allegations

The company alleged that Qian and Jiang were in breach of the restraint of trade clauses in their service agreements with the company (including a non-competition clause and several non-solicitation clauses) by their alleged activities and association with Trigiant.

The company also alleged that Jiang and Qian were in breach of fiduciary and/or statutory duties at law and/or in equity owed to the company including but not limited to the duties to:

(a) act *bona fide* in the best interests of the company;

(b) not use their positions or act in a manner so as to obtain any unauthorised benefit for themselves or for any third party; and

(c) not act in a manner so as to place themselves in a position where their personal interests conflicted with the interests of the company.

In denying these allegations, Qian and Jiang argued that:

(i) they were not in breach of their service agreements (including the restrictive covenants) and/or their duties as directors;

(ii) the company could not enforce the restrictive covenants in their service agreements as the company was in repudiatory breach of their service agreements; and

(iii) the restrictive covenants were unreasonable, unnecessary restraints of trade and were wider than was reasonably necessary for the protection of the company's interests or those of the public. They counterclaimed for a declaration that the restrictive covenants were void and of no effect.

Restraint of trade clauses

The court noted that the general principle in this area of law is that in order to be enforceable, restraint of trade clauses must not be unreasonably wide in scope as *prima facie* they are contrary to public policy. The company must therefore demonstrate that it had a legitimate proprietary interest to protect by enforcing the restraint of trade clauses against the defendants especially for the two years stipulated in the service agreements.

It is accepted in law that the burden of proof to show reasonableness is on the party seeking to rely on the restraint of trade clauses - in this case, the company.

It is also well-established law that trade secrets and trade connections are legitimate proprietary interests that can be protected by restraint of trade clauses. However, the courts will not uphold clauses that:

- Inhibit competition;
- Protect the plaintiff from competition from a former employee;
- Pertain to the skill, experience, knowhow and general knowledge acquired by an employee during his course of employment even though it might equip him as a competitor of his employer.

The court also noted a UK House of Lords decision (*General Billposting v Atkinson* [1909] AC 118) and a English Court of Appeal decision (*Rock Refrigeration v Jones & Anor* [1997] 1 All ER 1) where it was held that when an employer repudiated a contract of employment and that repudiation was accepted by the employee, the employee was thereupon released from his obligations under the contract and restrictive covenants otherwise valid against him could not be enforced.

The non-competition clause

The court noted that the non-competition clause in the restraint of trade clauses contained no territorial limitations, instead it utilised the all encompassing phrase “within any jurisdiction”. Given this potential worldwide restraint, the court said that the non-competition clause was less likely to be reasonable. The non-competition clause also did not define the term “business” with the consequence that unless the defendants knew the exact “business” that the company operated, they would not know what activities were prohibited for two years after leaving the company’s employment.

The court went on to say that it appeared that the defendants were restrained - directly or indirectly - from owning, managing, operating, controlling or being so employed or being connected in any manner in any business of the type and character engaged in by and competing with that of the company or any related company. The court found that this restriction was unnecessarily wide in its scope and the clause was therefore unenforceable.

The court also considered whether the company had any legitimate proprietary interest that required protection under the non-competition clause. The court noted that no evidence was adduced to support the wide-ranging allegations made by the company relating to Qian’s access to highly confidential information and that much of the defendants’ knowledge could be legitimately attributed to their own expertise.

Judgment

The court held that the scope of the non-competition clause was too wide to be considered reasonable and the company did not discharge its burden to prove that it had trade secrets, formulae and/or R&D knowledge which the defendants acquired in the course of their employment and that needed to be protected. The court found that the claim on the non-solicitation clauses failed as the company did not prove breach of the non-solicitation clauses, did not plead the clause, and/or the clause was unreasonably wide in scope and should not/cannot be enforceable. The court stated that in its opinion the company's motive in suing the defendants was to stifle competition.

The court also found that the company failed to disprove that it was not in repudiatory breach of the service agreements when it terminated the defendants' employment without the requisite six months' notice. The court noted that the fact was that the company chose to terminate the defendants' employment without cause, and that allegations by the company that Qian breached his service agreement were only raised for the first time much later in October 2007. After assessing the parties' witnesses, the court also found that the defendants were far more convincing in their testimony than Cui.

The court dismissed the company's suits against the defendants and upheld the latter's counterclaims.

Practical implications

The court's decision emphasises the importance of ensuring that the scope of a restraint of trade clause is limited to an identifiable legitimate interest which can be protected to ensure that it can still be enforceable. In drafting a restraint of trade clause, a careful balance has to be drawn between trying to extend the reach and scope of the clause to reduce the likelihood of a former employee damaging the employer's business, and the enforceability of the clause. The geographic extent and nature of the employer's business, the confidential information belonging to an employer which an employee has and which can be attributable to having been in the employer's service, and other relevant factors should be considered together with legal advice to try to ensure that the clause is reasonable in geographic extent, scope and duration.

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The court's decision also underscores the importance of ensuring that all entitlements and payments due to employees who are terminated without cause should be properly offered, accounted for and made as failure to do so may amount to repudiatory breach of contract on the part of the employer.

Allen & Gledhill LLP represented the successful defendants.

Back to Contents Page

Singapore District Court finds listed company director failed to use reasonable diligence

Public Prosecutor v Ong Chow Hong [2009] SGDC 387

The Singapore District Court in *Public Prosecutor v Ong Chow Hong* held that a director had failed to use reasonable diligence in the discharge of his duties under section 157(1) of the Companies Act, by approving the release of a public announcement by a listed company without reviewing the contents of the announcement. He had to pay a fine of S$4,000 and was disqualified from acting as a director for one year.

The accused, Ong, was the non-executive chairman and independent director of Airocean Group Limited ("**Airocean**"), a company listed on the Singapore Exchange Securities Trading Limited (the "**SGX-ST**"). In September 2005, the chief executive officer and executive director of Airocean (the "**CEO**") was arrested on corruption charges for giving bribes in relation to transactions concerning Airoceans' business.

Following the arrest of the CEO, five directors of Airoceans, including Ong and another independent director ("**Peter**") convened an urgent board meeting and they agreed not to make public what had happened to the CEO.

In November 2005, the Straits Times published an article entitled "*Airocean's chief executive Thomas Tay under CPIB probe*" (the "**News Article**"). The SGX-ST sought an explanation from Airocean as to why it did not make public the fact that its CEO was under a probe by the Corrupt Practices Investigation Bureau (the "**CPIB**"). Airocean was expected to make a public announcement in response to the News Article and Ong knew this. However, in the morning when the public announcement was due to be released, Ong had to participate in an official golf function and had informed his secretary that he would agree to any announcement that would be issued by Airocean as long as it was approved by Peter.

The announcement that was finally released was, in law, misleading in a material particular as it conveyed a different presentation of facts known to Airocean's board of directors.

The court held that Ong had failed to discharge his duty as a director. The court was of the view that, with his knowledge of the CEO's corruption charges, Ong should have realised the seriousness and the implication of the SGX-ST query regarding the News Article and the impact of the announcement on the share price of Airocean.

In the court's view, Ong was clearly derelict in the discharge of his duty by agreeing beforehand to any announcement that would be issued by Airocean as long as it was approved by Peter. The court held that he should have, at the very least, addressed his mind to the wording of the announcement and scrutinised it with the relevant legal input from his fellow directors as well as external counsel to ensure that such announcement met the statutory requirement of disclosure.

The present case clearly underlies the importance and seriousness of the responsibility placed upon a director of a company, particularly of a public listed company in which a duty is owed not only to shareholders but also to the stakeholders such as the SGX-ST.

In addition, it is prudent for a director to ensure that he applies his mind independently on each issue the board of directors has to consider, and that he is seen to do so. Documentation of a director's application of his mind and

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decision would be useful. A director should also avoid situations which may create an impression that he has delegated or fettered his approval or decision making power to another person.

Back to Contents Page

Dispute resolution

Singapore Court of Appeal on enforceability of foreign judgment relating to claim for gambling debt

Poh Soon Kiat v Desert Palace Inc [2009] SGCA 60

The Singapore Court of Appeal recently issued a judgment which concerns the enforceability of a foreign judgment by way of a common law action. In *Poh Soon Kiat v Desert Palace Inc*, the foreign judgment in question was based on a gambling debt incurred by the appellant when he gambled in casinos overseas. The Court of Appeal ruled that the foreign judgment was not a foreign money judgment for a fixed some of money but was, instead, a judgment for the setting aside of the fraudulent transfer of the appellant's interest in a certain piece of property. As such, the judgment was not enforceable because a foreign judgment could be enforced by way of a common law action only if that judgment was for a fixed sum of money. The Court of Appeal then went on to deal with the issues of the applicable limitation period under the Limitation Act as well as whether an action to enforce a foreign judgment based on a gambling debt could be brought or maintained in spite of section 5(2) of the Civil Law Act.

Relevant background facts

Between 1992 and 1998, the appellant was a patron of the casino operated by the respondent in Las Vegas, Nevada. The appellant obtained credit from the respondent to gamble in the casino. The appellant gambled, lost and failed to pay up, as a result of which the respondent obtained the following two default judgments:

- 1999 Nevada Judgment (by order of the District Court for Clark County, Nevada)
- 1999 California Judgment (by order of the Santa Clara Superior Court and was based on the earlier 1999 Nevada Judgment)

Subsequently, the respondent discovered that the appellant had transferred his one-third share in a property in California (the "**Property**") to a British Virgin Island company. This prompted the respondent, together with another casino operator who had also obtained a judgment against the appellant (the "**third party Judgment**"), to commence an action in the Santa Clara Superior Court to set aside the transfer on the ground that it was a fraudulent conveyance under the law of California. The respondent and the other casino operator were granted the judgment in default (the "**2001 California Judgment**") which specifically provided as follows:

- the transfer of the appellant's interest in the Property to be set aside;
- the appellant's interest in the Property was to be sold and the proceeds applied in part or full satisfaction *pro rata* of the 1999 California Judgment and the third party Judgment;

- if the sale proceeds were insufficient to satisfy both the 1999 California Judgment and the third party Judgment in full, the appellant was to remain liable for the shortfall.

After taking into account the proceeds from the sale of the appellant's interest in the Property, there remained a shortfall which was due and owing to the respondent.

Commencing action in Singapore

The respondent commenced a common law action in the Singapore courts to enforce the 2001 California Judgment in Singapore in order to recover the shortfall from the appellant (the "**Singapore action**").

Before the Assistant Registrar

The respondent was not successful before the Assistant Registrar who held that a common law action on a foreign judgment would be time-barred under section 6(1)(a) of the Limitation Act after the expiry of six years from the date of accrual of the cause of action, that date being "the date of the judgment in question as that was the date when the judgment debt came into being".

High Court decision

The High Court judge reversed the decision of the Assistant Registrar and held as follows:

- The 2001 California Judgment was a fresh judgment which imposed an obligation on the appellant to pay the sums specified in that judgment;

- An action to enforce a foreign judgment was subject to a limitation period of six years under section 6(1)(*a*) of the Limitation Act, although, the judge was of the view that the applicable limitation period should be 12 years under section 6(3) of the Limitation Act.

- Section 5(2) of the Civil Law Act did not apply to any action in Singapore on the 2001 California Judgment. Section 5(2) provides that "No action shall be brought … in the court for recovering any sum of money … alleged to be won upon any wager or which has been deposited in the hands of any person to abide the event on which any wager has been made".

The appellant appealed against the judge's decision.

Court of Appeal decision

The Court of Appeal allowed the appeal and held that the Singapore action should have been dismissed on the ground that the 2001 California Judgment was not enforceable by way of a common law action in Singapore because it was not a judgment for a definite sum of money ("**foreign money judgment**").

The law on the enforceability of foreign judgments in Singapore, on the basis of a common law action, requires the foreign judgment to be for a definite sum of money, which expression includes a final order of costs. The 2001 California Judgment was, instead, a judgment setting aside the fraudulent transfer by the appellant of his interest in the Property (with certain consequential orders made as well). The Court of Appeal disagreed with the High Court judge who held that the 2001 California Judgment was a fresh foreign money judgment and could therefore be sued for the amount specified therein.

The Court of Appeal then went on to deal with the other two issues which were raised on appeal although there was no need to do so after it decided that the 2001 California Judgment was not enforceable under Singapore law on the basis that it was not a foreign money judgment.

Set out below are the Court of Appeal's views on the two other issues raised:

- **Applicable limitation period**: Since a common law action on a foreign judgment is an action on an implied debt, it is subject to the limitation period of six years in section 6(1)(*a*) of the Limitation Act.

- **Applicability of section 5(2) of the Civil Law Act**: Section 5(2) of the Civil Law Act would appear to bar a common law action on a foreign judgment (whether emanating from a Commonwealth country or a non-Commonwealth foreign country) whose underlying cause of action was founded on a gambling debt. The Court of Appeal, when giving its views on this issue, was careful to emphasise that its intention was not to express any conclusive opinion on this particular point.

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Back to Contents Page

Intellectual property & technology

Singapore Court of Appeal considers the requirement of "use as a trade mark" for the purpose of trade mark infringement

This recent development was highlighted in the Allen & Gledhill Intellectual Property & Technology Review of 28 December 2009.
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City Chain Stores (S) Pte Ltd v Louis Vuitton Malletier [2009] SGCA 53

In *City Chain Stores (S) Pte Ltd v Louis Vuitton Malletier*, the Singapore Court of Appeal had the opportunity to consider the question that has perplexed trade mark practitioners in Singapore and in England alike, namely, whether or not, in order to establish trade mark infringement under section 27 of the Singapore Trade Marks Act (the "**Act**"), the alleged infringing use by the defendant must also constitute "use as a trade mark".

Background facts

The plaintiff is part of the LVMH Group which owns the world-famous LOUIS VUITTON brand. The plaintiff's product line includes fashion and travel items, luggage, handbags, leather goods, footwear, jewellery and watches. The plaintiff started applying the Flower Quatrefoil trade mark to its watches in 2002, and has been selling its watches under the Flower Quatrefoil trade mark in Singapore since 2004.

The defendant is part of the City Chain watch retail chain of stores selling watches and clocks, of which "*Solvil*" was a house brand. In November 2006, the defendant launched a range of watches bearing the "*Solvil*" trade mark and a flower device (the "**Solvil watches**") which were made available for sale in their retail outlets in Singapore.

Taking the view that the flower device on the Solvil watches (the "**Solvil Flower**") was identical with or similar to its Flower Quatrefoil trade mark, the plaintiff proceeded to file complaints with the Magistrate Court and raided four of the defendant's retail outlets in Singapore with the search warrants obtained. Shortly after criminal charges were filed against the defendant, the plaintiff commenced the present action against the defendant for trade mark infringement, passing off and dilution of its well known trade mark.

Decision of the High Court

The High Court had decided that the plaintiff succeeded in its claim on the grounds of infringement of trade mark under sections 27(1) and 27(2) of the Act (identical or similar trade marks), in passing off, and under section 55 of the Act (dilution of well known trade mark). In particular, the judge had rejected the defendant's argument that the use of the Solvil Flower as mere decoration or embellishment on the watches did not constitute trade mark use, on the ground that such a defence is not expressly found in section 28 of the Act.

Three main issues were in dispute in this appeal, namely:

(a) whether the defendant's Solvil watches infringed the plaintiff's registered Flower Quatrefoil trade mark under sections 27(1) and 27(2) of the Act;

(b) whether the plaintiff's claim for passing off had been established; and

(c) whether the defendant had breached section 55 of the Act on the protection of well known trade marks.

"Use as a trade mark"

The Court of Appeal dealt first with the issue of whether the offending use must be in the nature of a "trade mark use" for the purpose of establishing infringement. The court undertook a detailed analysis of the differing approaches adopted by the English courts and the European Court of Justice (the "**ECJ**") - the former generally preferring the narrower and stricter view requiring "trade mark use", i.e. use as an indication of origin. The ECJ, on the other hand, formulated the "functional" approach that focuses instead on whether the offending use is liable to affect the functions of the registered trade mark (the "**broader Community approach**").

On balance, the court expressed a preference for the stricter approach as being more in line with the object of trade marks law, although for purposes of the present appeal, the same result was reached whichever approach was adopted.

On the facts, seeing that there was no uniformity in the way the Solvil Flowers were represented on the defendant's watches, the court had no difficulty in finding that the predominant use of the Solvil Flower was for decoration purposes, and hence did not amount to trade mark use. This should have concluded the question of infringement, if not for the broader Community approach which required further inquiry. This was because the function of the plaintiff's Flower Quatrefoil trade mark could still be affected in view of the similarity of the Solvil Flower and the fact that the Solvil Flower motif was prominently displayed on the Solvil watch.

Infringement under sections 27(1) and 27(2) of the Act

The court went on to consider the position under sections 27(1) and 27(2) of the Act. Taking a strict interpretation of the word "identical", the court concluded that the Solvil Flower and the Flower Quatrefoil trade mark were not identical for two main reasons. First, the Solvil Flower lacked a distinctive circle in its centre. Secondly, the shape of the respective petals on the Flower Quatrefoil trade mark and the Solvil Flower were different.

While the court was of the view that the Flower Quatrefoil trade mark and the Solvil Flower were similar when compared as a whole, it decided that there was no likelihood of confusion on the part of the public as to the origin of the Solvil watches. The court accepted that the target consumers of the Solvil

watch are likely to be the young and trendy consumers looking for a bargain, whereas the target consumers of the plaintiff's watch are likely to be more sophisticated and of a high income level. The court was of the view that neither the target consumers nor the general public would be confused given that:

(a) the SOLVIL mark appears in the centre of the Solvil watch face and the overall appearance of the watches are different;

(b) the Solvil watches are sold at the defendant's stores in Singapore located throughout the island whereas the plaintiff's watches are only sold in its boutiques at three upmarket locations in Singapore (at that time);

(c) the plaintiff forbade the sale of its goods by other retailers;

(d) the Solvil watches were generally priced below S$200 whereas the plaintiff's watches were priced between S$4,000 and S$60,000; and

(e) the defendant's Solvil watches were marketed in a way that closely associated them with its SOLVIL mark.

The court also disagreed with the High Court judge's finding that the public might believe that the defendant was licensed by the plaintiff or that there was collaborative marketing, primarily because no evidence had been adduced to indicate such an association on account of either the advertisements, methods of sale or the packaging of the Solvil watch, and hence, any risk of confusion was merely hypothetical and speculative.

Having found that infringement had not been established under sections 27(1) and 27(2) of the Act, the court allowed the defendant's appeal.

Passing off

In respect of the plaintiff's claim for passing off, the court explained that the relevant date to consider goodwill was November 2006, which was the date of commencement of sale of the defendant's Solvil watches in Singapore. The court found that the plaintiff had failed to adduce any specific evidence to show that the plaintiff had sold a single watch bearing the Flower Quatrefoil trade mark in Singapore between 2004 and November 2006. The High Court judge had erred in taking into account events after November 2006.

The court also held that it is not sufficient to establish goodwill in the LOUIS VUITTON brand *generally*, but rather, goodwill in relation to the Flower Quatrefoil trade mark must be proved *specifically*. The court opined that the plaintiff's reputation in its watches is likely to be in the LOUIS VUITTON mark, and it is possible that the plaintiff's watches were sold (if at all) due to the goodwill in the LOUIS VUITTON mark, rather than the Flower Quatrefoil trade mark, since the Flower Quatrefoil trade mark had never been used *alone* on any of the plaintiff's watches. The High Court judge had therefore erred again in taking into account the goodwill of the plaintiff generally.

The court was therefore of the view that the plaintiff had not proved that the Flower Quatrefoil trade mark possessed goodwill. Given this finding, it was strictly not necessary to consider the other two elements of misrepresentation and damage.

In *obiter*, the court found that no misrepresentation had been established for the same reasons that a likelihood of confusion was not found under the claim of infringement.

On the issue of damage, the court opined that the High Court judge had inappropriately taken judicial notice of certain "facts" in concluding that damage to the plaintiff's name had been made out. The High Court judge had said that people are put off by fakes and cheap look-alikes in the market. Without specifying the luxury brands which have been so affected, the court was of the view that the High Court judge's approach was too broad-brushed and seemed to be based on feel rather than fact. More importantly, the court found that the plaintiff had failed to adduce any evidence of a correlation between falling sales and an increase in fakes and cheap look-alikes in the market. The court accepted that there are numerous factors which can influence a consumer's purchasing decision, especially, in respect of an expensive luxury item.

The plaintiff therefore failed in its claim under the tort of passing off, and the defendant's appeal was allowed.

Dilution of well known trade mark under section 55(3) and section 55(4) of the Act

The court held that for a mark to be "well known to the public at large" under section 55(3)(b)(i) of the Act, it must be recognised by *most* sectors of the public, but not necessary *all*. Given that there was no evidence that the Flower Quatrefoil trade mark had been promoted or used on its own as a trade mark, the court was unable to agree with the High Court judge that the Flower Quatrefoil qualifies as a trade mark *well known to the public at large*. In particular, the court expressed disapproval of the High Court judge's proposition that just because a mark is conspicuous and not descriptive, it has become well known.

Finally, the court held that section 55(4) did not apply as the Solvil Flower was only used to distinguish the defendant's goods, and not as a business identifier.

The plaintiff therefore failed in its claim for dilution under section 55 of the Act, and the defendant's appeal was allowed.

Commentary

In its judgment, the Court of Appeal recognised that the broader Community approach may have the effect of granting greater and excessive protection to registered trade mark proprietors, and may also lead to uncertainty as whether a sign is liable to affect the function of a registered trade mark is a finding of fact. The court did however remark that it may well be that the differences between the two approaches are merely linguistic in nature, and that the same practical result would be obtained from either approach when the essential function of a trade mark is eventually considered under the broader Community approach.

Although the Court of Appeal had left open the issue of whether trade mark use is required for the purpose of establishing infringement, this decision is still valuable in that it has clarified and reinstated several important fundamental concepts of trade mark law. For example, it is now trite law that the concept of identical marks under section 27(1) of the Act entails a strict interpretation, and that in a passing off action, goodwill must be proved specifically in relation to the mark in question, at the relevant time.

If you would like to discuss the impact of this case on your business, please contact:

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Reference material

An article about the High Court decision in this case was featured in a previous issue of the Allen & Gledhill Intellectual Property & Technology Review (No. 2 of 2009). Please **click here** to read the article entitled

"*Singapore High Court holds flower device on watches infringes well known trade mark*".

Back to Contents Page

Real estate

Singapore Court of Appeal finds binding contract between parties for grant of option and that doctrine of part performance part of Singapore law

Joseph Mathew & Anor v Singh Chiranjeev & Anor [2009] SGCA 51

The Singapore Court of Appeal case of *Joseph Mathew & Anor v Singh Chiranjeev & Anor* raised issues relating to a contract to grant an option for the purchase of real property as well as issues concerning the statutory formalities that have to be satisfied before such a contract is legally enforceable.

The issues

In this case, the respondents made an offer to purchase an apartment (the "**Property**") owned by the appellants. There were three main issues before the Court of Appeal:

(a) Whether there was a binding contract between the parties for the grant of an option for the sale of the Property.

(b) If there was a binding contract whether the requirements in section 6(d) of the Civil Law Act ("**section 6(d)**") were satisfied.

(c) If the requirements in section 6(d) were not satisfied, whether the contract between the parties was nevertheless enforceable on the ground of part performance.

Binding contract between parties for grant of option

The court opined that an agreement to grant an option can be enforced if all the essential terms have been agreed upon and the requirement that the terms be evidenced in writing has been satisfied.

The court had to determine whether the parties had entered into a valid contract for the grant of an option by the appellants to the respondents for the sale of the Property. The respondents had made an offer to the appellants through the appellants' agent, Helene, to purchase the property. In an e-mail from the first appellant to Helene, the first appellant stated that that he was "taking a decision to proceed to sell the property at [the offered price]" and instructed Helene to deposit the one per cent. cheque from the respondents into his bank account. Helene deposited the cheque as instructed. The first appellant was also aware of all the other terms relating to the option to be granted which were in fact contained in an earlier e-mail. The appellants argued that they were only to be bound upon signing the option to purchase.

The court held that there was clear evidence, based on the e-mail correspondence between Helene and the first appellant, that the parties had indeed entered into a valid contract for the grant of an option for the sale of the Property. There had not only been the fulfilment of the requisite legal elements of offer and acceptance, but also sufficient consideration furnished by the respondents to the appellants. The contract to grant an option for the

sale for the Property was binding between the parties when (at the latest) the one per cent. cheque was deposited into the first appellant's bank account. The final requirement relating to the formation of a valid and binding contract, i.e. an intention to create legal relations, was also present at this point in time. The subsequent signing of the option was only a formality and merely a necessary part of the process of giving effect to a binding agreement to grant an option that had already been entered into between the parties.

E-mails satisfied formality requirements in section 6(d) of Civil Law Act

In order to be enforceable by the respondents, the contract had to comply with the statutory formalities pursuant to section 6(d) of the Civil Law Act. Section 6(d) provides that an action to enforce a contract for the sale of immovable property may only be brought if the contract, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith.

The court referred to the Singapore High Court decision of *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd* [2005] 2 SLR 651 ("***SM Integrated***") where it was held that e-mail correspondence could be considered to be "in writing" and could also satisfy the requirements for a "signature" for the purposes of section 6(d). In arriving at this decision, the court in *SM Integrated* noted that while the Electronic Transactions Act (the "**ETA**") makes it plain that electronic records will be adequate to satisfy legal rules relating to writing and signature in most commercial matters, its conservative approach in not extending these provisions to contractual matters falling within section 6 of the Civil Law Act does not mean that, as a matter of law, electronic means of communication cannot satisfy the requirements of section 6. The ETA does not change the common law position in relation to section 6. Whether an e-mail can satisfy the requirements for writing and signature found in that provision will be decided by construing section 6(d) of the Civil Law Act itself and not by blindly relying on section 4(1)(d) of the ETA.

The court in the present case also referred to the Parliamentary Debates relating to the ETA where it was stated that although section 4 of the ETA excludes from its operation certain matters such as wills and documents of title, this does not "prevent the courts from recognising the use of electronic documents in these matters on a case-by-case basis".

In the court's view, all the requirements under section 6(d) were clearly satisfied in the present case.

Doctrine of part performance part of Singapore law

Part performance is an exception to the requirements under section 6(d). It is equitable in origin and was intended to prevent, *inter alia*, section 6(d) from itself being utilised as an engine of fraud.

The court noted that, prior to the present case, precise reasons why the doctrine is applicable in Singapore had never been canvassed in detail. The court held that the doctrine of part performance was and continued to be part of Singapore law by virtue of the general reception of English law and, subsequently, via section 3(1) of the Application of English Law Act.

On the facts of the case, the court found that the payment of the one per cent. cheque, on the back of which the Property was fully identified, into the first appellant's account was an act referable to the contract to sell the Property and there was thus part performance.

If you would like to discuss the impact of this case on your business, please contact:

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Back to Contents Page

News

Suntec Real Estate Investment Trust's private placement of 128.5 million new units

Suntec Real Estate Investment Trust ("**Suntec REIT**") has made a private placement of 128.5 million new units to raise gross proceeds of approximately S$152.9 million to reduce Suntec REIT's existing indebtedness. The private placement was priced at the maximum issue price of S$1.19 per new unit and was more than five times over-subscribed.

Advising ARA Trust Management (Suntec) Limited as manager of Suntec REIT are Allen & Gledhill LLP Partners Jerry Koh and Chua Bor Jern, Senior Associate Teh Hoe Yue and Associate Chong Ying Chiang.

Back to Contents Page

Proposed acquisition of Heineken's entities in Indonesia and New Caledonia by Asia Pacific Breweries Limited

Asia Pacific Breweries Limited ("**APBL**") and Heineken International B.V. ("**HI**") have entered into the following share purchase agreements with an aggregate consideration of approximately S$536.3 million to provide for:

- the disposal by APBL of the entire issued share capital of Asia Pacific Breweries (Aurangabad) Private Limited and Asia Pacific Breweries-Pearl Private Limited to HI; and
- the acquisition by APBL of:
  - approximately 87.3 per cent. interest in Grande Brasserie de Nouvelle Caledonie S.A.
  - approximately 68.5 per cent. in PT Multi Bintang Indonesia Tbk and 1 share of PT Multi Bintang Indonesia Niaga. Upon completion of this acquisition, APBL intends to acquire the worldwide ownership and use of the BINTANG marks.

Advising APBL as to Singapore law are Allen & Gledhill LLP Partners Andrew M. Lim, Steven Lo, Stanley Lai, Christopher Koh, Senior Associates Lynn Ho and Gloria Goh and Associates Tan Teng Sen, Chan Wei Hsuen and Bernia Tan.

Back to Contents Page

MacarthurCook Industrial REIT's proposed recapitalisation exercise

MacarthurCook Investment Managers (Asia) Limited (the "**Manager**"), as Manager of MacarthurCook Industrial REIT ("**MI-REIT**"), obtained approval from MI-REIT unitholders for a series of transactions that will result in the refinancing and recapitalisation of MI-REIT.

The transactions include:

- the recently completed placement of 78.6 million new units of MI-REIT to AMP Capital Holdings Limited ("**AMP Capital**"), which raised gross proceeds of S$22 million;
- the recently completed placement of 142.9 million new units to certain cornerstone investors, including the AIMS Financial Group, the current sponsor of MI-REIT, which raised gross proceeds of S$40 million;
- a fully-underwritten rights issue of 975.6 million new units on the basis of two rights units for every one unit held, which will raise gross proceeds of S$155.1 million; and
- the acquisition by MI-REIT of four industrial assets in Singapore from AMP Capital Business Space REIT, for a total purchase consideration of S$68.6 million.

As part of the proposed transactions, AMP Capital will acquire 50 per cent. of the Manager and 50 per cent. of MacarthurCook Property Management Pte Limited, the property manager of MI-REIT, from AIMS. AMP Capital has also committed to sub-underwrite a portion of the rights issue, which may bring its total

investment in MI-REIT to S$54.1 million. The foregoing transactions are intended to position AMP Capital as a joint sponsor of MI-REIT alongside the AIMS Financial Group.

Advising the Manager and MI-REIT in relation to its recapitalisation and refinancing exercise are Allen & Gledhill LLP Partners Jerry Koh, Foong Yuen Ping and Chua Bor Jern and Associates Melissa Chong and Louis Lim. Advising MI-REIT on the acquisition of four industrial properties located in Singapore and on its property-related issues are Allen & Gledhill LLP Partner Chew Mei Choo and Senior Associate Lee Chau Hwei. Other Allen & Gledhill LLP Partners who advised the Manager on various specialist legal issues include Prawiro Widjaja, Christopher Ong, Andrew Yeo, Edwin Tong, Andy Yeo, William Ong, Christine Chan and Jean Wan.

Back to Contents Page

MacarthurCook Industrial REIT's term loan facility

MacarthurCook Industrial REIT ("**MI-REIT**") has signed a S$175 million term loan facility with Standard Chartered Bank, Commonwealth Bank of Australia and National Australia Bank Limited as original lenders and arrangers. Proceeds from the 3-year facility will be used to refinance existing loans and to finance its general corporate funding purposes. MI-REIT has also signed a S$40 million bridge facility with Standard Chartered Bank as original lender and arranger. Proceeds from the bridge facility has been used to finance the acquisition of an industrial building located in the International Business Park in Singapore.

Advising MI-REIT are Allen & Gledhill LLP Partner Julie Sim and Associates Tan Hian Zee and Melanie Tan.

Back to Contents Page

Starhill Global REIT acquires Starhill Gallery and Lot 10 in Malaysia

Starhill Global Real Estate Investment Trust ("**Starhill Global REIT**"), managed by YTL Pacific Star REIT Management Limited (the "**Manager**"), entered into a heads of agreement with Starhill Real Estate Investment Trust ("**Starhill REIT**"), to acquire Starhill REIT's interests in Starhill Gallery and Lot 10 Shopping Centre on Bukit Bintang, Kuala Lumpur's main shopping street, through an asset back securitisation structure ("**ABS Structure**"), for a total consideration of approximately S$423.3 million. This is the first transaction involving the transfer of properties from a Malaysia REIT to a Singapore REIT. It is also the first time a Singapore REIT makes a major acquisition of properties in Malaysia via an ABS Structure.

Acting as Singapore counsel to the Manager in respect of this transaction are Allen & Gledhill LLP Partners Jerry Koh and Chua Bor Jern, Senior Associate Henry Tan and Associate Wu Zhiyou.

Back to Contents Page

Mermaid Maritime Public Company Limited's rights issue

Mermaid Maritime Public Company Limited (the "**Company**") has completed its renounceable underwritten nine for 20 rights issue of 243,542,403 new ordinary shares to raise gross proceeds of approximately S$156 million. Merrill Lynch (Singapore) Pte Ltd ("**Merrill Lynch**"), a wholly-owned subsidiary of Bank of America Corporation, was the sole bookrunner, manager and underwriter to the rights issue. The transaction is the first ever renounceable rights issue by a Thai-incorporated company listed on the Singapore Exchange Securities Trading Limited ("**SGX-ST**"), requiring compliance with Thai regulatory requirements and laws, as well as SGX-ST rules.

Advising Merrill Lynch are Allen & Gledhill LLP Partners Tan Tze Gay, Rhys Goh and Shawn Chen, Senior Associate Neda Namazie and Associate Tan Shengjie.

Back to Contents Page

Acquisition of David Jones Building

Starhill Global REIT intends to acquire David Jones Building, a retail property located in central Perth, Australia for A$114.5 million from the Centro Properties Group which is listed on the Australian Stock Exchange.

Advising as Singapore counsel to Starhill Global REIT are Allen & Gledhill LLP Partners Jerry Koh and Chua Bor Jern, Senior Associate Henry Tan and Associate Wu Zhiyou.

Back to Contents Page

Benchmark notes issue by OCBC

Oversea-Chinese Banking Corporation Limited ("**OCBC**") has issued US$500 million 4.25 per cent. subordinated notes due 2019 callable with step-up in 2014 pursuant to its S$4 billion Programme for Issuance of Debt Instruments. The issue was a benchmark international offering to Asian and European based institutional and sophisticated investors and the notes are expected to qualify as lower tier 2 capital.

Advising OCBC as to Singapore law are Allen & Gledhill LLP Partner Au Huey Ling, Senior Associate Long Pee Hua and Associate Lam See Wai.

Back to Contents Page

Initial public offering of existing shares in CapitaMalls Asia Limited by CapitaLand Limited

CapitaLand Limited ("**CapitaLand**") has successfully completed an initial public offering ("**IPO**") of 30 per cent. of its shareholding interest in its retail arm, CapitaMalls Asia Limited ("**CMA**"), in conjunction with the Mainboard listing of CMA on the Singapore Exchange Securities Trading Limited ("**SGX-ST**"). The IPO raised total proceeds of approximately S$2.5 billion. If the over-allotment option granted by CapitaLand to J.P. Morgan (S.E.A.) Limited (as stabilising manager) is exercised in full, CapitaLand's interest in CMA would be reduced by a further 4.5 per cent and the total proceeds raised would be increased to approximately S$2.8 billion. The IPO is the second largest IPO in Singapore since the IPO of Singapore Telecommunications Limited in 1993.

The sole financial advisor was J.P. Morgan (S.E.A.) Limited ("**JPM**"). The joint issue managers were JPM and DBS Bank Ltd ("**DBS**"). The joint bookrunners and underwriters were JPM, DBS, Credit Suisse (Singapore) Limited and Deutsche Bank AG, Singapore Branch. Advising as to Singapore law were Allen & Gledhill LLP Partners Tan Tze Gay, Leonard Ching and Bin Wern Sern and Associates Alvin Zhuang and Rachel Koh.

Back to Contents Page

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